

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE COMMISSIONER OF HUMAN SERVICES

In the Matter of the Proposed  
Revocation of the Family Child  
Care License of Nancy Ostergaard

**FINDINGS OF FACT,  
CONCLUSIONS AND  
RECOMMENDATION**

The above-captioned matter came on for hearing before Administrative Law Judge (ALJ) Richard C. Luis on June 11, 2003 at the Winona County Human Services Building in Winona. The record closed on July 10, 2003 with the receipt of a late filing.

Susan E. Cooper, Assistant Winona County Attorney, 171 West Third Street, Winona, Minnesota 55987-3166, appeared on behalf of the Winona County Human Services Department ("County Agency") and the Minnesota Department of Human Services ("Department"). Eric T. Johnsrud, Pflughoeft, Pederson & Johnsrud, P. O. Box 436, 160 Lafayette Street, Winona, Minnesota 55987-0436, appeared on behalf of Nancy Ostergaard ("Licensee", "Respondent").

**NOTICE**

Notice is hereby given that, pursuant to Minn. Stat. § 14.61, the final decision of the Commissioner of the Department of Human Services shall not be made until this Report has been made available to the parties to the proceeding for at least ten days, and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to the Commissioner. Exceptions to this Report, if any, shall be filed with Kevin Goodno, Commissioner, Minnesota Department of Human Services, 444 Lafayette Road, St. Paul, MN 55155-3815.

**STATEMENT OF ISSUE**

Whether the family child care license of Nancy Ostergaard should be revoked because of an alleged lapse in supervision on November 15, 2001 that placed a two-year-old child in her care in danger for his life and safety?

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

**FINDINGS OF FACT**

1. On November 17, 2001, J.H., an across-the-street neighbor of the Licensee, called the County Agency to report an incident she alleged had occurred two days earlier. J.H. reported that on the morning of November 15, 2001, a two-year-old

boy in the Licensee's care was observed by her while playing by himself in front of the Licensee's house at 56 White Oak Court in Winona. J.H. alleged the child was outside for about five minutes, during which time he twice wandered into the middle of the street and once crossed the street completely, before going back to the Licensee's yard.

2. J.H. was drawn to her window by her dog, which was barking at the Ostergaard's dog, which had wandered across the street. She believes the child was attracted into and across the street by the Ostergaard's dog, a small Pomeranian. J.H. believes that the child must have come out of the Respondent's house, because he was wearing a t-shirt and was in stocking feet.

3. J.H. reported further that she called the Ostergaard residence after observing the child outside for five minutes to alert the Licensee to the problem. In an interview late in November or in December of 2001, J.H. stated that she had told the person answering the phone that the child was wandering in and across the street. At the hearing, she testified only that she told the person answering that one of the day-care kids was outside. J.H. reported that the young man (later identified as the Licensee's son, Jeff Ostergaard) who answered the phone then came out of the house, via the garage door, and picked up the child, who was standing near the protective housing for a utility control box on the Licensee's side of the street, several feet in front of the curb. The Licensee reported also that Nancy Ostergaard came out of the house with Jeff, through the garage door. Approximately five minutes later, a rubbish truck traveled down White Oak Court, which is a cul-de-sac street with approximately ten houses. J.H. estimates the traffic passing in front of her house totals 100 vehicles per day.

4. At the time J.H. called to report the unsupervised child, Jeff Ostergaard was at his computer desk and could not see out to the area in front of the Licensee's house. No one else was in the house. When told of the situation (he never mentioned or testified that the caller told him the child had gone into or across the street), he alone went outside through the garage door and saw C.S. (the child in question) walking back toward the garage with the Licensee. They were near the utility box housing, which lies approximately two-thirds of the way from the garage to the street, 6 to 8 feet from the curb. He does not remember picking up the child, who walked toward and into the garage along the Licensee and the half-dozen other children in Ms. Ostergaard's care that day.

5. At the time J.H. called Jeff Ostergaard, the Licensee had been in her back yard supervising her day-care children while they played outside. They were all dressed appropriately for the weather, in shoes. At the end of the play session, she moved the children back into her house, on a walking route around the back and side of her house to the garage door in front of their house. The Licensee reported that she never lost sight of C.S. (the youngest child in her care that day), who stayed in front of her as she moved him and the other children back inside. She admits that C.S. did get as far as the mailbox at the side of her driveway, but came back to the area of the utility box as she moved down the side of the driveway to collect him.

6. The Ostergaards and J.H.'s family have been on unfriendly terms with each other for a number of years, stemming from an incident in the late '80s when J.H.'s

dog (a poodle) seriously bit Jeff Ostergaard, who was then 11 years old. The history between the two families has been one of numerous complaints from J.H.'s family (she and her husband), especially from her husband, about such matters as snow removal, alleged nuisances caused by the Ostergaard's dogs (two small Pomeranians), the lighting outside the Ostergaard's house and traffic and noise generated by families dropping off or picking up their children at the Ostergaards, particularly in the early morning hours. J.H. was also aware that her grand-niece, who had been in the care of the Licensee some years prior to the incident in question here, could not be found one day when her mother came to pick her up, because she had mistakenly been locked out onto the Licensee's porch just prior to her mother's arrival. Ms. Ostergaard's license had been placed on probationary status for that incident.

7. The County Agency investigated the incident described above and made two separate determinations. The first, by the Agency's Child Protection Unit, determined that C.S. was a victim of maltreatment/neglect, in that he had been outside alone for a period of time and was not clothed properly. The determination of maltreatment/neglect was appealed, and an evidentiary hearing was conducted by a referee of the Minnesota Department of Human Services (Department), who decided there was no neglect or maltreatment (Exhibit 6). J.H. did not testify at that hearing.

8. The parents of C.S. allowed C.S. and his older sister to continue in Ms. Ostergaard's care, even after being informed by County Agency officials of the allegations made by J.H. C.S.'s mother maintains it would have been out of character for C.S. ever to leave the company of his older sister, who is 19 months older. C.S. was born October 21, 1999, and his sister, who also was at the Ostergaard house for day care on November 15, 2001, was born March 5, 1998.

9. The second determination of the County Agency, made by its Licensing Unit, was to recommend revocation of Ms. Ostergaard's license for leaving a toddler unattended outside her home for approximately five minutes. The Department affirmed that recommendation and issued an Order of Revocation against Ms. Ostergaard's license, which Order was duly appealed. This hearing process followed.

10. Both the County recommendation for and the Department Order of Revocation also alleged that Jeff Ostergaard, as of the time of the November 2001 incident, was not registered as "an employee who will regularly be providing care" or as a regular member of the household. Jeff Ostergaard had moved back to his parents' house in May or June, 2001, after graduating from college in Florida, while he was in the process of applying to graduate school. During that interim, Jeff Ostergaard helped his mother with day-care duties until he enrolled as a graduate student at Ohio State in the fall of 2002.

11. Sometime in April, 2001, after she learned that Jeff was planning to move back home after graduation, Nancy Ostergaard filed proof of having attended certain required training and enclosed a note that her son, Jeff, would be joining the household. The note indicating that Jeff Ostergaard would be coming home after graduation was never processed by the County Agency.

Based on the above Findings of Fact, the Administrative Law Judge makes the following:

### **CONCLUSIONS**

1. The Administrative Law Judge and Commissioner of Human Services have jurisdiction in this matter pursuant to Minn. Stat. § 14.50 and 245A.07, subd. 3.
2. The Department gave proper and timely notice of the hearing and has complied with all substantive and procedural requirements.
3. The County Agency has established reasonable cause (the report from J.H.) to believe that a child in the care of Nancy Ostergaard was left unattended in front of her house for approximately five minutes on November 15, 2001. There was also reasonable cause for the County Agency to conclude that the Respondent had failed to report the fact that Jeff Ostergaard had moved back to her house, since it learned he was there on November 15, 2001 and they had no record of being notified he had moved in that spring.
4. The Licensee, Nancy Ostergaard, has established by a preponderance of the evidence that she has complied with all applicable statutes and rules, and her license to provide family child care should not be disciplined. She has established by a preponderance of the evidence that C.S., a two-year-old child in her care, was supervised properly on November 15, 2001, and that she complied with the requirement of Minn. Rule 9502.0375, subp.2A by informing the County Agency within 30 days that her son, Jeff Ostergaard, had moved back to her house.

Based upon the above Conclusions, the Administrative Law Judge makes the following:

### **RECOMMENDATION**

IT IS RECOMMENDED that the Order Revoking the License of Nancy Ostergaard to Provide Family Child Care be RESCINDED, and that no disciplinary action should be taken against her license.

Dated this 17th day of September, 2003

/s/ Richard C. Luis

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RICHARD C. LUIS  
Administrative Law Judge

Reported: Taped. No transcript.

### **NOTICE**

Pursuant to Minn. Stat. § 14.62, subd. 1, the Commissioner is required to serve the final decision upon each party and the Administrative Law Judge by first class mail.

If the Commissioner fails to issue a final decision within 90 days of the close of the record under Minn. Stat. § 14.62, subd. 2a, the Recommendation of this Report will become the final agency decision.

### **MEMORANDUM**

The charge against the Licensee involving a failure to report the presence of Jeff Ostergaard in the household should be dismissed. The Licensee testified credibly that she filed a timely, appropriate notice with the County Agency to report her son's pending return to her house. It appears that the notice never got recorded properly after the first filing, but the Licensee did all she needed to in order to comply with the rule.

As for the November 15 "incident", the Administrative Law Judge believes the account related by the Licensee and her son. In general, he concludes their credibility is higher than that of the witness against them, J.H. It is un rebutted that J.H. and her husband have a long history of animosity toward the Ostergaards, and that much of the animosity is directed against Ms. Ostergaard's use of her house as a day care facility. It is troubling also that J.H. did not alert her husband of the alleged danger that C.S. was in while in or crossing the street (she testified her husband was in the basement), and that she did nothing herself to help the child directly. Her excuse for not aiding directly, that she was taking care of her own nine-month-old grandchild and could not go outside, does not ring true, especially in light of her alleged concern for traffic along the street (she estimated 100 vehicles a day pass in front of her house), and her admission that it was a nice day. Her inaction suggests that the child was never in or went across the street. In that connection, it is noted that J.H. mentioned in her interview with the County Child Protection worker that she told the person answering the phone at the Ostergaards that the child had wandered into the street, but failed to testify she told him that at the hearing. This suggests that the child may never have left the Ostergaard's yard.

It is troubling also that J.H. waited two days to bring the alleged incident to the County's attention. If she had actually seen the incident described by her, it seems that she would have called the authorities immediately, especially in light of the danger she testified existed. It is significant also that C.S.'s parents decided to keep their children in the care of the Licensee, even in light of the allegations made by J.H. and transmitted by the County Agency. It appears they did not believe the story as it had been related.

As for the Ostergaards, nothing in Jeff Ostergaard's testimony contradicts that of J.H. in any material way. They both agree that the child was near the utility box housing when Jeff first would have seen him. The only material discrepancy is that Jeff does not remember picking up C.S. to bring him into the garage door, which J.H. says happened. It is significant that Jeff Ostergaard never mentioned or testified that J.H. told him a day-care child was in or across the street, which suggests those particular actions did not happen.

The Licensee testified that C.S. was with her as she reached the corner of the house and that he went ahead of her, but never out of her sight, as she and the other day care children moved between houses toward the garage door (see Map of property, Ex. 5). It is conceivable that the child was far enough ahead of her to be at the utility box (approximately 12-14 feet from the garage door, still several feet from the curb/street) or even at the mailbox (near or at the curb) before he stopped or turned around, as the Licensee directed the other children inside the house. In either situation, C.S. was still within her sight and control. The ALJ believes Jeff Ostergaard's testimony to the effect that he first saw his mother and C.S. together as they were walking back together to the garage door, approximately 8 feet from him and 4 feet from the utility box housing. That testimony is consistent with a scenario that C.S. got ahead of the Licensee, but never reached the street. The ALJ believes that is what happened.

A controlling question is whether Ms. Ostergaard is to be believed in testifying that C.S. never left her sight. For that to be true, it must be believed that the Licensee had all the children in her care that day (C.S. included) with her as they played in the backyard, and that they all stayed within her sight and control as she brought them back inside the house (which requires a walk from the backyard, between the sides of Ostergaards' and a neighbor's house to the garage door in front of the house). In this regard, the ALJ believes the Licensee. She was credible relating her version of the facts, and the ALJ simply does not believe she would have forgotten about C.S. for so long without missing him. The evidence also implies strongly that C.S.'s older sister would have missed him as well, but there is no evidence that she did.

It is likely that during the return to the Licensee's house from her backyard, C.S. advanced far enough out in front of Ms. Ostergaard such that J.H. saw him in the vicinity of the utility box housing and/or the Ostergaard's mailbox and was unable to notice that C.S. was still being watched by, and was effectively in the control of, the Licensee. From her perspective, J.H. may have believed the child was unsupervised and in danger (when actually he was not), and called the Ostergaards to inform them. As to the call, the only evidence showing she told the person answering that a day-care child was in the street is her uncorroborated, unsworn statement (see Ex. 4) that is not supported by sworn testimony at the hearing, and the ALJ has discounted that unsworn statement. He is persuaded that by the time J.H. decided to call officials of the County Agency the allegations that the child wandered into and across the street were added. The Judge concludes that the Licensee has proven that such wandering did not occur.

In arriving at his Recommendation, the ALJ has given little weight to the Licensee's evidence that a tree in J.H.'s yard would have blocked her view of the Ostergaard yard (Ex. 10), and has reached his conclusions based upon the reasons given above.

**R.C.L.**